Central Law Journal.

St. Louis, Mo., May 27, 1921.

AN ENGLISH CRITICISM OF A DECISION OF THE SUPREME COURT OF THE UNITED STATES.

It is sometimes interesting to see ourselves as others see us. Sir Frederick Pollock, editor of the Law Quarterly Review (London) gives us this pleasure, by his criticism of the decision of the Supreme Court of the United States in the case of Abrams v. United States, 250 U. S. 616, 89 Cent. L. J. 443.

This decision, our readers will remember, affirmed a conviction of defendants under an indictment charging a conspiracy to encourage resistance to the United States while at war with Germany, and to incite and advocate curtailment of production of munitions essential to the prosecution of the war. The defendants were Russian aliens interested in the new Soviet regime and anxious to prevent American intervention in that country They attacked the President of the United States in printed handbills and called on the workers of America to "awake, arise, put down your enemy and ours, capitalism." They also urged the munition workers not to manufacture arms "to murder your dearest friends in Russia, fighting for freedom." The judgments were for fifteen and twenty years, respectively.

Sir Frederick Pollock first discusses the atmosphere of suspicion in America during the war and its effect on courts and juries. He says:

"Spy mania was, it would appear, in the air of New York in 1918, and Judge and jury may be presumed, as the most charitable explanation of their conduct, to have been suffering from an acute form of truculent panic, to use Kinglake's term. The Judge in the Abrams case cross-examined the defendants quite in the fashion of sixteenth-century State trials, charged the jury without any reference to the specific offenses created by the statute, and after a general verdict of guilty (with how much deliberation it was found, we are not told) passed sentences of fifteen years' imprisonment on one and twenty years' on three defendants; an informer was let off with three years. 'If they had actually conspired to tie up every munition plant in the country and succeeded the punishment could not have been more.' For a similar offense in England the usual sentence would be imprisonment for six months, or twelve at the outside. The Supreme Court had no jurisdiction to reduce the sentence or to consider whether it was excessive. Most English lawyers, I think, will agree that a Court of error might properly have been astute to find any tenable reason in law for quashing the conviction."

With respect to the charge that the defendants, conspired to encourage resistance to the United States while at war with Germany, the editor says that there was nothing in the paper that suggested armed resistance against the government of the United States and that an appeal to workers to throw off the yoke of capitalism and not to make munitions to kill their own friends does not amount to such resistance.

The most plausible charge, according to Sir Frederick, was that which declared that defendants conspired to incite workers to reduce production of munitions essential to the prosecution of the war. The learned writer shows that the evidence discloses that the only purpose of the writers was to prevent a war with Russia and not to interfere with the war with Germany. He takes special exception to Justice Clarke's contention that the defendants must be presumed "to have intended the effects which their acts produced" and that "even if the primary purpose of defendants was to aid the Russian Revolution, the plan of action which they adopted necessarily involved the defeat of the war program of the United States." To this contention the learned editor replies:

"But the doctrine that a man is presumed to intend the natural consequences of his

acts will not carry so far as to dispense with proof of a particular intent where that intent is expressly specified as an element in a new criminal offense by the statute creating that offense. Such a case is outside the ordinary and too often confused controversies about *mens rea*. Where an act is in itself unlawful (including in the act its manifestly necessary or highly probable conesquences in the sense that bodily harm, for example, is the natural consequence of an attack with a dangerous weapon), there good motives or intentions cannot be alleged as excuse. But where 'an act in itself indifferent, if done with a particular intent, becomes criminal'—much more, one would think, if the offense is statutory, and the particular intent is part of the statutory definition—'there the intent must be proved and found' (Lord Mansfield in R. V. Woodfall, 5 Burr. at p. 2667). It will not do to supply it by a mere inference of the Court that the defendant must have intended whatever the Court thinks a probable consequence of his act."

On the point raised by the dissenting opinion of Justice Holmes that if the Espionage Act did bear the construction put upon it by the majority of the Court, it would be unconstitutional under the clause of the First Amendment which forbids Congress to make any law abridging the freedom of speech of the press, Sir Frederick declared that any English lawyer must hesitate before making any criticism. Looking at the matter from an Englishman's point of view and without regard to the construction put upon the First Amendment by the Supreme Court of the United States the learned writer makes the following observation. He says:

This is ground on which an English lawyer must walk very warily. I will only observe that criticism of the Government's policy in war time, provided that information is not given to the enemy, nor obstruction offered to executive operations, has long been considered lawful here. Whether it is wise or foolish, polished or rude, whether it may contain matter punishable as a seditious or otherwise criminal libel, are again other and distinct questions. I think it is hardly open to doubt that the Fathers of the Constitution intended American citizens to be secured in the franchises of the Bill of Rights as interpreted by the Whig school of English publicists.

It is interesting also to observe in this connection that the son of Sir Frederick, about two years ago, narrowly escaped with his life from the Bolsheviks. This fact the learned writer declares is not calculated to make him particularly biased "by any personal sympathy with the Soviet Government." He declares that he cannot see how any reasonable man "who will attend to the evidence," can believe the present Russian Government to be a popular government of any kind," but, he goes on to add, "I am not prepared to regard such belief as in itself a criminal offense, or to abandon the elementary rule of justice that every case must be tried and determined according to what is laid and proved."

NOTES OF IMPORTANT DECISIONS

SUITS ARISING UNDER THE LAWS AND CONSTITUTION OF THE UNITED STATES.—It seems to us that the Supreme Court has added greatly to its burdens by the broad statement in the recent case of Smith v. Kansas City Title & Trust Co., 41 Sup. Ct. 243, that "where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision."

This was a suit by a citizen stockholder of a Missouri corporation to enjoin the defendant from investing its fund in a certain manner. As diversity of citizenship was lacking, the jurisdiction of the District Court, where the suit was brought, depended upon whether the cause of action was one arising under the Constitution or laws of the United States. The suit sought to enjoin the defendant from investing their funds in non-taxable securities of the Federal Land Banks, on the ground that they were unsafe, invalid and unenforceable. The District Court gave judgment for defendant, and a direct appeal was taken to the Supreme Court, which, in affirming the judgment,

made the broad declaration set forth in the first paragraph of this note, and more specifically held as follows:

"In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is therefore apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue."

The point in this case is whether the phrase, "suits arising under the Constitution and laws of the United States" include suits arising wholly under the law of a state, even though incidentally there is involved the construction of a law of the United States, especially where such law is merely a measure or test of a power or liability created by the state itself. In this case the only question was whether certain investments could be made by a trust company in Missouri. Such a suit can hardly be said to "arise" under the laws of the United States, even though the Missouri Court might decide to test the validity of the investment by a reference to the Constitution or laws of the United States. On this point the words of Justice Holmes, dissenting in this case, are interesting. The learned justice said:

"It is evident that the cause of action arises not under any law of the United States, but wholly under Missouri law. The defendant is a Missouri corporation and the right claimed is that of a stockholder to prevent the directors from doing an act; that is, making an investment, alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. If those laws had authorized the investment in terms the plaintiff would have had no case, and this seems to me to make manifest what I am unable to deem even debatable; that as I have said, the cause of action arises wholly under Missouri law. If the Missouri law authorizes or forbids, the investment according to the determination of this Court upon a point under the Constitution or Acts of Congress, still that point is material only because the Missouri law saw fit to make it so. The whole foundation of the duty is Missouri law, which at its sole will incorporated the other law as it might incorporate a document. The other law or document depends for its relevance and effect not on its own force, but upon the law that took it up, so I repeat once more, the cause of action arises wholly from the law of the state."

The mere adoption by a state of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore*, does not, as Justice Holmes says, cause a case under the state law to be also a case under the law of the United States, and so it has been decided by the Supreme Court again and again. Miller v. Swann, 150 U. S. 132, 136, 137, 14 Sup. Ct. 52, 37 L. Ed. 1028; Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 303, 35 Sup. Ct. 598, 59 L. Ed. 965. See, also, Shoshone Mining Co. v. Rutter, 177 U. S. 505, 508, 509, 20 Sup. Ct. 726, 44 L. Ed. 864.

We do not believe that this case is justified by the decision in Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, or by Brushaber v. Union Pacific Co., 240 U. S. 1, 36 Sup. Ct. 236, L. R. A. 1917 D. In both these cases, plaintiff sought to enjoin the payment of a federal tax, and thus the actual enforcement of the federal law was involved in the case.

It seems to us clear, therefore, that the Smith case enlarges the jurisdiction of the Supreme Couprt by drawing to it suits "involving" as well as "arising under" some law or provision of the Constitution of the United States.

RIGHT OF FOREIGN AMBASSADOR TO FILE A "SUGGESTION" OF FOREIGN OWNERSHIP OF A SHIP ATTACHED BY PROCESS.—An interesting incident occurred in the trial of the attachment of a boat called "The Pesario." The Italian Ambassador filed in the District Court (S. D., N. Y.), a "Suggestion that the boat attached was the property of the Italian government." On the filing of this paper the district judge, over the objection of the libelant, released the boat from arrest and filed the certification of the grounds of its decision, to-wit:

"I do certify that the vessel was released from arrest by me by a final decree herein, solely because I deemed that the United States District Court, sitting as a court of admiralty, has no jurisdiction to subject to its process a steamship which is by the suggestion of the said Italian Ambassador filed in this court represented to be the public property and in the possession of the kingdom of Italy."

The Supreme Court reversed the decision of the District Court on the ground that the Ambassador has no authority to file such a suggestion in the Court, since he did not offer to appear on behalf of his government as a party to the case, but should have presented his "suggestion" to the Secretary of State. "The Pesaro," 41 Sup. Ct. 308. On this point, the Court said:

"We come then to consider whether the court erred in sustaining the Ambassador's suggestion that the ship was not subject to its process. Apart from that suggestion, there was nothing pointing to an absence of jurisdiction.

On the contrary, what was said in the libel pointed plainly to its prescence. The suggestion was made directly to the court and not through any official channel of the United States. True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status, it gave no sanction to the suggestion. The terms and form of the suggestion show that the Ambassador did not intend thereby to put himself or the Italian government in the attitude of a suitor, but only to write a respectful suggestion and invite the court to give effect to it. He called it a "suggestion," and we think it was nothing more. In these circumstances the libelants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken. In re Muir, Master of the Gleneden, 41 Sup. Ct. 185. And see United States v. Lee, 106 U. S. 196, 209, 1 Sup. Ct. 240, 27 L. Ed. 171."

PRICE REGULATION.

The Federal Constitution is a grant. State Constitutions are limitations. In construing grant and limitations, contemporaneous and antecedent history and the common law should be considered.[1]

History discloses many examples of price fixing. In the code of Hammurabi charges are fixed, and as said by Mr. Justice Hill of the Supreme Court of Georgia "the principle of regulation is not new, but has come down to us from the ancients."[2] In A. D. 301 Diocletian regulated prices but without public advantage.[3] France, during the revolution, over-issued paper money and sought to counteract the error with a law fixing maximum prices.[4] Economists and historians say both laws were futile, Hugo the idealist says the success of the Revolution was made possible by assignats and the maximum.[5]

About a year before the Constitution of the United States was framed, Adam Smith summed up the history of price fixing in England as follows:

"In ancient times, too, it was usual to attempt to regulate the profits of merchants and other dealers, by rating the price both of provisions and other goods. The assize of bread is, so far as I know, the only remnant of this ancient usage."

Further, and quoting from Richard Burn, who wrote about 1750, Adam Smith said:[6]

"I shall conclude this long chapter with observing, that though anciently it was usual to rate wages, first by general laws extending over all the whole kingdom, and afterwards by particular orders of the justices of peace in every particular county, both these practices have now gone entirely into disuse. 'By the experience of above four hundred years,' says Doctor Burn, 'it seems time to lay aside all endeavours to bring under strict regulations, what in its own nature seems incapable of minute limitation; for if all persons in the same kind of work were to receive equal wages, there would be no emulation, and no room left for industry or ingenuity."

John Winthrop[7] in 1639 gives an interesting account of price regulation by the then form of government in the colony of Massachusetts. The offender was fined 200 pounds "for taking above six pence in the shilling profit." The diarist gives details of the argument for and against a conviction as follows:

"For the cry of the country was so great against oppression, and some of the elders and magistrates had declared such detestation of the corrupt practice of this man (which was the more observable, because he was wealthy and sold dearer than most other tradesmen, and for that he was of ill report for the like covetous practice in England, that incensed the deputies very much against him.) And sure the course was very evil, especial circumstances considered: 1. He being an ancient professor of the gospel; 2. A man of eminent parts; 3. Wealthy, and having but one child; 4. Having come over for conscience sake, and for the advancement of the gospel here; 5. Having been formerly dealt with and ad-

(1) Rhode Island v. Massachusetts, 12 Pet. 657, 9 L. Ed. 1233. United States v. Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890, 18 Sup. Ct. 456.

(2) Watkins, Shippers & Carriers, Sec. 36.

(3) Prices and Price Control in Great Britain and the United States, by Simon Litman, published by Carnegie Endowment for International Peace.

(4) Id, pp. 5-8.

(5) "Ninety Three," by Victor Hugo.

(6) Wealth of Nations, Vol. 1, Book 1, Chap. X.

(7) Winthrop's New England, edited by James Savage, Ed. 1825, Vol. 1, p. 314, seq.

monished, both by private friends and also by some of the magistrates and elders, and having promised reformation; being a member of a church and commonwealth now in their infancy, and under the curious observation of all churches and civil states in the world. These added much aggravation to his sin in the judgment of all men of understanding. Yet most of the magistrates (though they discerned of the offense clothed with all of these circumstances) would have been more moderate in their censure: 1. Because there was no law in force to limit or direct men in point of profit in their trade; 2. Because it is the common practice in all countries, for men to make use of advantages for raising the prices of their commodities; 3. Because (though he were chiefly aimed at, yet) he was not alone in his fault; 4. Because all men through the country, in sale of cattle, corn, labor, etc., were guilty of the like excess in prices; 5. Because a certain rule could not be found out for an equal rate between buyer and seller, though much labour had been bestowed in it, and divers laws had been made, which upon experience, were repealed, as being neither safe nor equal. Lastly, and especially because the law of God appoints no other punishment but double restitution; and, in some cases, as where the offender freely confesseth, and brings his offering only half added to the principal.

"After the court had censured him, the church of Boston called him also in question, where (as before he had done in the court) he did, with tears, acknowledge and bewail his covetous and corrupt heart, yet making some excuse for many of the particulars, which were charged upon him, as particularly by pretense of ignorance of the true price of some wares, and chiefly by being misled by some false principles, as, 1. That, if a man lost in one commodity, he might help himself in the price of another; 2. That if, through want of skill or other occasion, his commodity cost him more than the price of the market in England, he might then sell it for more than the price of the market in New England, etc. These things gave occasion to Mr. Cotton, in his public exercise the next lecture day, to lay open the errour of such false principles, and to give some rules of direction in the case."

While it has been definitely shown by experience that the policy of regulating prices by law was wrong because injurious and futile, the legal competence of the law maker to fix prices was generally recognized at the time our national fundamental law was written.

In 1841[8] the Supreme Court of Alabama, following English practices and precedents, held that the price of bread could be regulated.

Applicable to the question here under discussion, Congress is limited to legislation not in conflict with the fourth, fifth and sixth amendments to the Constitution, and state legislation by Article 1, Section 10, and the fourteenth Amendment. As the Supreme Court of the United States is the final arbiter of questions arising under said article and each of those amendments, and as that court has rendered numerous opinions from which can be gathered data comprehensive enough accurately to deduce the present state of authorities, I deem it sufficient to discuss only these opinions.

Munn v. Illinois, followed at the same time by the other Granger Cases[9] decided in 1876 is quoted as authority as late as April, 1921, and is universally accepted as our leading authority on the subject of price fixing. In that case the court quoted from Lord Hale to the effect that a public use authorizes control by the public and from Lord Ellenborough holding that a like right exists as to the property of one who takes the benefit of a monopoly. Mr. Chief Justice Waite referring to the public-use basis said: "When private property is devoted to a public use it is subject to public regulation."

That monopolies and contracts and agreements directly producing restraints in trade

(8) Mayor of Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441. See also Guillotte v. New Orleans, 12 La. Ann. 432.

(9) Munn v. Illinois, 94 U. S. (4 Otto.) 113, 24 L. Ed. 77; Chicago, B. & Q. R. Co. v. Iowa (v. Cutts), 94 U. S. 155, 24 L. Ed. 94; Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; Stone v. Wisconsin, 94 U. S. 181, 24 L. Ed. 102.

tending to a monopoly are within the regulating power of the appropriate legislative body is so universally accepted that I shall not here further discuss that basis for regulatory statutes.

"Public interest," resulting from a "public use" spoken of an otherwise private business is indefinite and in determining what is such the court in the Granger Cases looked to judicial history, and expressly limited the right to legislate in saying:

"In countries where the common law prevails it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation * * * (for property clothed with a public use). Undoubtedly in mere private contracts relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract."

Mr. Justice Field dissenting in the Granger Cases said the right to fix prices was limited to cases where (1) "There was some special privilege granted by the state," (2) Monopolies, and (3) for the use of money; also with the vision of a true prophet said:

"No reason can be assigned to justify legislation interfering with the legitimate profits of that business (grain elevator) that would not equally justify an intermeddling with the business of every man in the community, so soon, at least, as his business became generally useful."

He also said that the principle announced by the majority justified the regulation of prices for "a calico gown" and a "city mansion." It will be seen later in discussing rent fixing laws, that the Great Justice correctly stated the results of the decision.

The Railroad Commission cases of 1886 and similar cases relating to water and light rates,[10] and the 1913 railroad cases rest upon the undisputed principle of the right to fix the terms of a grant of "special privilege" and need not be further discussed.

(10) For a full list of these cases and a discussion thereof, see Watkins, Shippers & Carriers, 3rd Ed., Sec. 45 and notes.

(11) Cotting v. Godard, or Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. 30.

In 1901,[11] Mr. Justice Brewer, relying on the public-use—public-interest argument, presented the theory that while the right to regulate existed in cases where the property was devoted to public use and also in cases where by virtue of the conditions of the use the public becomes interested therein, the form of the regulation should be different. This opinion in the case generally referred to as the Kansas City Stock Yards Case decided the regulatory statute was invalid because discriminatory. The decision was unanimous, but six of Mr. Brewer's associates withheld their approval of the reasoning of the author of the opinion. The only value this case has in this discussion is to show that six of the nine judges then on the Supreme Court bench were not ready to bring private business, which by virtue of the conditions of the use of property had become of public interest, within the meaning of "public use" authorizing price regulation.

Adam Smith means by "regulations of police" and "rules of police" when discussing statutory price fixing much the same as courts mean by "police power." Police power, which our courts decline to define, means nothing more than the field to which a legislative tribunal may apply its statutes. The difficulty is not in defining police or legislative power, but in fixing boundaries to this field. The field is not delimited and the boundaries are constantly changing and broadening. Mr. Justice Holmes in the case of Noble State Bank (1911) sought to provide a formula for use in determining at any particular time the boundaries of this legislative field. This learned lawyer and charming writer said:[12] "It may be said in a general way that the police power extends to all the great public needs.[12a] It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and

12) Noble State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 Sup. Ct. 186, affirming 22 Okla. 48, 97 Pac. 590.

(12a) Camfield v. United States, 167 U. S. 518, 42 L. Ed. 17 Sup. Ct. Rep. 864.

immediately necessary to the public welfare."

This formula rather increases the difficulty. What before was indefinite, remains indefinite, and becomes shifting. "Usage," "Prevailing Morality" and "Preponderant Opinion" can hardly be confined to any generally accepted and certain standard. However, we can get such comfort in our search for guidance as is possible from the decisions to this date (1911), which omitting monopolies and special privileges, may be reduced to the rule:

The appropriate legislative tribunal may regulate the rate or charge for a service or price of a commodity when the service is furnished or the commodity sold by a business in which the public has an interest; and what constitutes a public interest is determinable by judicial history, usage, prevailing morality and preponderant opinion.

The Kansas Statute regulating the rates and charges of fire insurance companies was in 1914 sustained by the Supreme Court.[13] Lord Ellenborough's rule that monopolies could be regulated was ample authority supporting the conclusion, and Mr. Justice McKenna said:

"We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character."

Although the reasoning quoted was sufficient ,the court also relied on the public interest theory, saying: "The basis of the ready concession of power of regulation is the public interest."

While emergency as the basis for regulating the rate of charge for the service of a laborer was foreshadowed in Wilson v. New,[14] the law there considered was sustainable on the principle that it was incidental to the regulation of railroads possessing a public franchise.

In sustaining in April, 1921, the laws regulating rents in the District of Columbia, the Supreme Court has advanced the boundaries of the legislative regulatory field farther than that court had ever theretofore authorized.[15] Temporary conditions are here given determinable force and legislative tribunals are left almost if not quite the final arbiters of what is a public interest.

The Rent Law Cases" relate to a statute of Congress applicable in the District of Columbia and a similar New York State statute, both regulating the price for the use of land and the relationship between landlord and tenant. The Supreme Court of the District of Columbia held the district law to be invalid, while the New York law was held valid by the Court of Appeals of the state and the District Court of the Southern District of New York, Hough, Mayer and Augustus N. Hand, presiding. The Supreme Court on April 18, 1921, in Block v. Hirsh, held constitutional such regulations. Four judges dissented from the prevailing opinion in the Supreme Court. Mr. Justice Holmes, announcing the opinion of the majority, relied on the public-interest argument, the analogy of laws limiting the height of buildings, mine appliance laws, laws regulating the price of insurance and the usury laws. The learned Justice referred to decisions sustaining such laws and the majority opinion may be fairly epitomized in one quotation as follows:

"These cases are enough to establish that a public exigency will justify the legislature

(13) German-Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. 612.

(14) Wilson v. New (1917), 243 U. S. 332, 61 L. Ed. 755, 37 Sup. Ct. 298. See also Ft. Smith & W. R. R. v. Mills, 253 U. S. 206.

(15) Hirsh v. Block, 267 Fed. 614; Marcus Brown Holding Co. v. Feedman, 269 Fed. 306. People of New York, ex. rel. v. La Fetra, March 15, 1921. New York Law Journal, Block v. Hirsh, Supreme Court of the United States, April 18th, 1921.

in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height, to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property right now in question if the public exigency requires that.

"The reasons are of a different nature, but they are certainly not less pressing. Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of public interest justifying some degree of public control are present."

It was pointed out that the particular statute was valid, but in the language of the opinion: "For just as there comes a point at which police power ceases and leaves eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

Reliance is had on the authority of Munn v. Illinois, supra, and it must be admitted that this latest approval of price fixing is a legitimate offspring of the opinion of forty-five years ago. Munn v. Illinois has been questioned for these forty-five years. Mr. Justice Field and other of the learned Justices have definitely stated whither the decision leads; in this latest case five Justices adopt the logical corollary from the older majority opinion and the present minority opinion is a natural sequence of former dissenting opinions. Two schools of thought now and since its creation have been represented on the bench of the Supreme Court. What might be called the latitudinarian school is now and generally has been slightly predominant in number. The Kansas City Stock Yards Case shows an exception to this general rule. There six judges rejected the argument of public interest stated by Mr. Justice Brewer. That changes in public thought may affect the relative strength of these schools is true and it is no reflection on these great judges that it is true. Mr. Justice Holmes, in his delightful Collected Legal Papers, discussing John Marshall, calls him a "loose constructionist" and calls it a "fortunate circumstance" that Adams and not Jefferson had the appointing power when Marshall was appointed. Implied in what Mr. Justice Holmes said, and known to all students of judicial history, is the fact that a "loose" rather than a "strict" construction changed the history of America. If the school of thought now in the majority controls we shall have one destiny, but should the present minority become a majority, there is for us a different destiny. Personally I believe there is greater safety in such a construction of our Constitution as will keep legislation within the bounds our fathers sought to set up. The landmarks of our fundamental law should be preserved. It is the law that power begets a desire for more power and the "loose constructionist" theory will probably prevail.

Judge Hough briefly stated in his opinion on the New York Statute the present formula as follows:

"On reason, then, if a given subject-matter is appropriate to the exercise of sovereign action, and such action has not been expressly and absolutely prohibited by the federal Constitution as authoritatively construed, the legislative result is not forbidden, where the purpose is within the range of *reserved sovereignty*, the *means appropriate* and the *reason sufficient*, even though in reaching the result some toes be trodden on; and how many toes and how severely they may be trampled is a question that varies with circumstances."

The learned Circuit Judge further in discussing the "Elevator Cases"[16] relied on the public interest theory and cited German-Alliance Ins. Co. v. Lewis, supra, as broadening that theory and intimated agreement

(16) Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Budd v. New York, 144 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247 ;Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 39 L. Ed. 757.

with a definition of public interest as being anything the legislature might be "sufficiently interested in to pass a regulatory statute." Rather broad, but logically a definition justified by former decisions. It is hoped that in the war between logic and common-sense, spoken of by Mr. Justice Holmes,[17] that common sense will win.

The foregoing shows that the field of legislation is now almost boundless.

There is yet some protection as to the form of legislation within that field. There may be classification, but the classification cannot be arbitrary. "Equality of rights," said the Supreme Court, "is the foundation of free government."[18] What "equality" here means is under the decisions of the Supreme Court lacking in definiteness and the legislative power of classification is gradually becoming less limited. Here, as in most legal questions, the "glorious uncertainty of the law" prevails and if a "state of facts reasonably can be conceived that would sustain" the statute, courts will not interfere.[19] Legislatures, the Congress and the courts should heed President Harding in his inaugural address, in which he said:

"Our fundamental law recognizes no class, no group, no section; there must be none in legislation or administration."

Laws must also be definite. That the sixth amendment has not fallen into a state of desuetude has recently been held by the Supreme Court in holding void section 4 of the Food Control Act.[20] Commissions given the administrative function of finding what under a particular state of facts is a reasonable price or charge must themselves obey the constitution.[21]

Save as to the form of legislation the decisions in the Rent Law Cases, supra, leave a dangerously wide discretion to legislators; and, for the protection of many rights, heretofore thought safely resting with courts, who were not subject to the influence of changing and frequently unreasoning public opinion, the appeal must now be made to legislators. When the world shall have recovered from the shell shock of the great war it is hoped and believed that legislation will be based on the principle:[22]

"The inalienable rights of personal security and safety, orderly and due process of law, and the fundamentals of the social compact, the basis of organized society, the essence and justification of government, the foundation, key, and capstones of the Constitution. They are limited to no man, race, or nation, to no time, place or occasion, but belong to man, always, everywhere, and in all circumstances. Every nation demands them for its people from all other nations. No emergency in war or peace warrants their violation, for in emergency, real or assumed, tyrants in all ages have found excuse for their destruction. Without them, democracy perishes, autocracy reigns, and the innocent suffer with the guilty. Without them is no safety, peace, content, happiness, and they must be vindicated, defended, and maintained in the face of every assault by government or otherwise."

If legislators should disregard the fundamental principles of this free government and seek by too much regulation to destroy individualism and handicap initiative, it must be remembered that decisions based on an emergency and reached by a majority of only one are not necessarily permanent authority. Courts may change their opinions.

EDGAR WATKINS.

Atlanta, Ga.

(17) Collected Legal Papers, p. 50.

(18) Conally v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431.

(19) Rast v. Van Deman, 240 U. S. 1342, 60 L. Ed. 679, 36 Sup. Ct. 370, L. R. A. 1917-A 421, Ann. Cas. 1917-B 455.

(20) United States v. Cohen Grocery Co.; Tedrow v. Lewis & Son Dry Goods Co.; Kennington v. Palmer; Kinnane v. Detroit Creamery Co.. Weed & Co. v. Lockwood; Willard & Co. v. Palmer; Oglesby Grocery Co. v. United States; Weed, Inc. v. United States, decided Feb. 28th, 1921.

(21) Watkins, Shippers & Carriers, Sections 309 to 316 and notes citing cases.

(22) Ex parte, Jackson, 263 Fed. 110, 113.

RAILROADS—INCIDENTAL WORK AS INTERSTATE COMMERCE

ADAMS v. HINES, Director General of Railroads.

196 Pac. 19.

Supreme Court of Washington. March 3, 1921.

A section hand, on the main line of a railroad company engaged in interstate commerce, who left the section under the direction of the foreman, accompanying the latter on a motorcar to another town to get supplies, was not engaged in interstate commerce, so that he could recover under the federal Employers' Liability Act (U. S. Comp. St. §§ 657-8665) for injuries resulting from the derailment of motorcar, it appearing that, though the foreman had the right to hire men, it was contrary to the rules of the company that he should leave the section during working hours; and hence, as the company had made other arrangements to furnish the foreman and his crew with supplies, the foreman and section hand were not engaged in the master's business.

MITCHELL, J. Action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) to recover damages for personal injuries. The case was tried by the court without a jury and resulted in findings and conclusions of liability on the part of the defendant, that the plaintiff had been injured by the negligence of the defendant, that the total damages amounted to $4,000, from which amount the sum of $1,500 should be deducted because of the contributory negligence of the plaintiff. Judgment for plaintiff was entered in the sum of $2,500. No exceptions were taken by the plaintiff to the findings and conclusions, nor has he taken any appeal. Exceptions were taken by the defendant, who has appealed from the judgment.

The respondent had been employed for some days by the appellant as a member of a section gang engaged in surfacing, repairing and maintaining the upkeep of the main line of the defendant railroad which was engaged in interstate commerce. The crew consisted of nine to twelve men including a foreman, all of whom lived in a section house at a station or place called "Mack," on their section, which was a part of the main line of the railroad running through Adams county. At the section house, for the accommodation of themselves and one other not belonging to the crew, they conducted what they termed "a kind of club," bought their own supplies, did their own cooking, and each paid his part of the cost and expense so incurred. On Saturday, April 27, in the forenoon, while the gang was at work on the section, it appears there was talk among the men to the effect they would get through early and go to Washtucna for meat and groceries. The foreman testified he did not remember which ones of the crew spoke to him about it, but that "they asked me if I would take them to get food, to go for supplies, and I told them if we finished the work here we will have time to go down." The foreman and his crew used a motorcar for their transportation on the section. About the middle of that afternoon they quit work and went to the section house. The water keg and about all the work tools were taken off the motorcar. The foreman put some of his crew at work cleaning up around the section house. He took the remaining four or five of them, including the respondent, and two other persons not belonging to the crew (one of whom wished to go for supplies), on the motorcar and proceeded to Washtucna, situated some 25 miles from the section in charge of this foreman. Washtucna is situated on a branch line of the railroad and is in the second section west of Mack. Upon reaching Washtucna, meat and other supplies for the club were purchased by some of the party other than the foreman or the respondent. Within a few hundred yards after starting back, about or a few minutes before 6 o'clock, the motorcar ran into an open switch, clear off the track, and caused the respondent's injuries complained of.

The main contention in the case is whether or not the respondent was "employed in interstate commerce" at the time he was injured, as that term is used in the act of Congress (Act April 22, 1908, 35 Stat. L. p. 65, c. 149; U. S. Comp. St. 1916, §§ 8657-8665).

The language of the act of Congress is general rather than concrete. For the purposes of this case it provides that every common carrier by railroad while engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, etc." As supporting the judgment, attention is called to the recent case of P. B. & W. R. Co. v. Smith, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. 869. That case, however, is not helpful authority here. It was a case in which a cook employed by the company was injured in a collision between an engine and a camp car, on a side track, while he was at work in the camp car provided by the railroad company. He was at work with a gang of bridge carpenters engaged in the repair of bridges along the entire line of the railroad and was moved from point to point as the repair work required. His duties

were to take care of the camp car, keep it clean, attend to the beds, and prepare and cook the meals for himself and other members of the gang. "He was employed by the defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their beds and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang, and forwarding their work by reducing the time lost in going to and from their meals and their lodging place." The camp car was "furnished and moved by the defendant." That is to say, he was injured at his post of duty according to a plan and design allowed, ordered and approved by the railroad company. Not so in the case at bar where the respondent was injured away from the section to which he belonged. He was away not only without permission, but in the face of the rules of the railway company. His place of duty was fixed, and on the occasion in question the crew was in no sense forwarding the work of the employer by reducing the time to procure supplies. The supplies could have been had at any time by delivery by the railway company at their clubhouse door rather than use the employer's time to carry out the unnecessary plan of their foreman.

The respondent also relies on the case of B. & O. R. Co. v. Whitacre, 124 Md. 411, 92 Atl. 1060, affirmed by the Supreme Court of the United States, 242 U. S. 169, 37 Sup. Ct. 33, 61 L. Ed. 228. The decision of the Supreme Court of the United States does not go into particulars. As reported in the Maryland decision, it appears that Whitacre was a front brakeman and was called about 1 o'clock in the morning to attend a train about to be moved in interstate commerce. He reported and proceeded through the yard of the railroad company to the engine which was to be coupled to his train. It was standing on a "ready track," and upon his inquiring of the fireman (the engineer not being present) whether he was ready to start, he received the answer:

"No, not quite. The tool boy had not been there and left him no tin cup, and he asked me to go and hunt the tool boy and get a tin cup."

That was the testimony of the plaintiff. Acting on what he understood to be the order of the fireman, he started to look for the tool boy and tin cup. He mistook a moving light for a lantern in the tool boy's hand. Suddenly the light disappeared behind an object subsequently ascertained to be an engine. Plaintiff took a few steps backward and fell into a cinder pit and was injured. The court concluded there was liability under the federal act, resting its decision upon the case of P. B. & W. Co. v. Tucker, 35 App. D. C. 123, and N. C. R. R. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159. In the Tucker case, a locomotive fireman was prorerly called at an unusual time of the night from his lodging place for train service. In going to his engine and while he was upon the company's tracks, he became confused, it seems, by the passing of two trains running in opposite directions, and was killed. It was contended by the company that there could be no liability until he reached the engine or conveyance of the company; that until then he was not under the master's control. But the court held otherwise, saying when Tucker was killed, he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage; and further said:

"We think the better rule, the one founded in reason and supported by authority, is the relation of master and servant, in so far as the obligation of master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master."

The Zachary case was similar. A locomotive fireman after inspecting, oiling, firing, and preparing his engine for starting on a trip, attempted to cross certain tracks that intervened between the engine and his boarding house and was struck and killed by another engine. The state court held that the federal act did not apply, but the United States Supreme Court held that it did. Neither of the three cases is applicable here, where the employee's situation was lacking in the essential spoken of in the Tucker case, that of being "rightfully and necessarilly" at the place of business at the time of the injury.

In the case of Morrison v. C., M. & St. P. R. Co., 103 Wash. 650, 175 Pac. 325, speaking of determining if one is or is not engaged in interstate commerce, in a given case, we said that test is:

"Would the performance of the act in which the employee was engaged directly and immediately tend to facilitate the movement of interstate commerce, or, conversely, would the failure to perform the act directly and immediately interfere with or hinder the movement of such commerce? In applying this test the three essential factors to be considered are time, place, and intent."

By that test, the law, though "intended to be applied in spirit rather than by letter," cannot be made to cover this case. Without any

authority, the foreman and part of his crew, including the respondent, were away on the company's time, as they (other than the respondent) had been before, to purchase supplies to last for two or three weeks, pursuant to their clubhouse plan, when there was no necessity whatever to conduct their clubhouse so as to either take them off their section or to lose any time from their service to the railroad company. That there was no necessity is shown by the evidence to the effect that after the accident and up to the date of the trial, the same foreman and his crew, at the same section or clubhouse, had provided well for their meals by railroad transportation of needed supplies—a plan at all times theretofore available and sufficient when employed. While the accident occurred on the appellant's property, respondent's engagement at the time was not so directly connected with interstate commerce as to constitute an integral part of it. "To render the carrier liable, the negligent act must occur while the employees are doing some act required in the prosecution of the carrier's business." Reeve v. N. P. R. Co., 82 Wash. 268, 144 Pac. 63, L. R. A. 1915C, 37.

Reversed, with directions to the trial court to enter a judgment dimsissing the action.

NOTE—*Incidental Work as Part of Interstate Commerce.*—Whether a railroad employee is engaged in interstate commerce so as to come within the Federal Employers' Liability Act depends upon whether the work being done is so closely related to interstate commerce as to be practically a part of it. Erie R. Co. v. Collins, 253 U. S. 77, 40 Sup. Ct. 450; Minneapolis, etc., R. Co. v. Winters, 242 U. S. 353; Pedersen v. Delaware, etc., R. Co., 229 U. S. 146.

The operator of a signal tower and pumping station, consisting of water tank and a pumping engine, by means of which water was supplied to engines engaged in both interstate and intrastate commerce, was held to be engaged in interstate commerce while attending the pumping station. Erie R. Co. v. Collins, 253 U. S. 77, 40 Sup. Ct. 450.

A foreman of a wrecking crew employed in connection with interstate commerce, and who was injured before leaving his train at night and while getting it in readiness for immediate service, was held to remain in interstate commerce until such work was completed. Director General v. Ronald, 265 Fed. 138.

An engineer, who, in preparation for an interstate trip, walked through the yards to procure some oil ,and was killed while so doing, was engaged in interstate commerce. Hines v. Burns' Adm'x., Ky., 226 S. W. 109.

A railroad employee returning to his employer's station after delivering interstate mail pouches to another carrier for further transportation, was engaged in interstate commerce. Cleveland, etc., R. Co. v. Industrial Commission, Ill., 128 N. E. 516.

The timekeeper of a gang of men repairing a track used in interstate commerce, who was struck by a train while on his way to make his daily telegraphic report, was engaged in interstate commerce. Crecelius v. Chicago, etc., R. Co., Mo. 223 S. W. 413.

The conductor of an interstate freight train was still engaged in interstate commerce after he left his train and was on his way to the yard master's office to deliver records. Anderson v. Director General, N. J., 110 Atl. 829.

A member of an interstate train crew, killed during an 8-hour layover at the end of his run, while sleeping in the caboose, which was being transferred from one point to another in the train yards, was not employed in interstate commerce at the time. Bishop v. Delano, 265 Fed. 263.

An interstate employee who was killed while riding home after his day's work on a train on which he had a free pass, was not engaged in interstate commerce. Knorr v. Central R. R., Pa., 110 Atl. 797.

A workman on a crane used for unloading coal cars, in order to create a coal reserve to be used in both interstate and intrastate commerce, was not engaged in interstate commerce. Kozimbo v. Hines, 268 Fed. 507.

An employee in charge of an oil tank, from which oil for engines and cabooses of both interstate and intrastate trains was supplied, but who did not distribute the oil, and who was injured while opening a valve of an oil tank car to run the oil from the car to the tank, was not engaged in interstate commerce. Lindway v. Pennsylvania Co., Pa., 112 Atl. 40.

An employee was injured while assisting in the work of discharging coal from a steamer into cars and onto a pile in the railroad yards. Some of the coal was intended for use in engines used in interstate commerce, and might be taken from the pile mentioned for that purpose, or might be taken from places where it would subsequently be moved. No part of it was so far appropriated or segregated for interstate use. Held, that such work was not as closely related to interstate commerce as to be a part of same, and that the Employers' Liability Act did not cover the injury. Foley v. Hines, Me., 111 Atl. 715.

A roundhouse laborer, dumping ashes from an engine which had recently come in carrying interstate freight, but which run was completed, was not engaged in interstate commerce. Boals v. Pennsylvania R. Co., 183 N. Y. Supp. 915.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM OF THE MEETING OF THE MICHIGAN BAR ASSOCIATION.

The thirty-first annual meeting of the Michigan Bar Association will be held at Flint, Mich., June 3 and 4, 1921.

The President's address will be given by Hon. James O. Murfin of Detroit. The annual

address will be made by Hon. Martin W. Littleton of New York City, whose subject will be "Criminal Practice and Procedure." Hon. Albert J. Beveridge will also address the Association on the "Life and Work of John Marshall."

PROGRAM OF THE LOUISIANA BAR ASSOCIATION MEETING.

The annual meeting of the Louisiana Bar Association will be held in Shreveport, June 3 and 4, 1921.

The President, Mr. Albin Provosty of New Roads, will deliver his annual address.

Other addresses will be made by the following: Mr. Arthur A. Ballantine, of the New York Bar, on "Federal Income and Profits Taxation;" Mr. Henry P. Dart, Sr., of New Orleans, on "History of Louisiana Law;" Mr. Edward Rightor of New Orleans, on "The Inheritance Tax Law of Louisiana;" Mr. Frank J. Looney, of Shreveport, on "The Action of the Constitutional Convention of 1921 on Suffrage."

Among the social features planned are a ball, a trip to the Shreveport oil fields, an excursion by boat, and a banquet.

PROGRAM OF THE MEETING OF THE ILLINOIS BAR ASSOCIATION

The forty-fourth annual meeting of the Illinois Bar Association will be held at Dixon, June 9, 10 and 11, 1921.

The President's address will be made by Mr. Logan Hay of Springfield. Hon. Chas. S. Cutting of Chicago, will deliver an address on "The Constitutional Convention." The Solicitor General, William L. Frierson, will deliver an address on "The Federal Constitution as Recently Amended."

There will be the usual reports of standing committees; and the annual reception and dinner will be given Friday, June 10th. Solicitor General Frierson will also speak.

CORRESPONDENCE.

DANGER OF THE INCREASED BURDEN ON THE FEDERAL SUPREME COURT FROM ITS CONTINUALLY EXPANDING DOCKET.

Editor, Central Law Journal:

I have read Mr. Shelton's editorial on "The Danger of the Increased Burden on the Federal Supreme Court from its Continually Expanding Docket."

Mr. Shelton does not exaggerate the situation. While the Supreme Court has gained on the docket during the last few years, it has done so by decreasing the time for oral arguments, and perhaps in other ways that curtail the time for discussion and consideration. This must result in lessening, to some degree, the quality of the work. It is a difficult situation, and I see no way to avoid it except by decreasing the number of cases which can go to that Court, which perhaps might be brought about by still further strengthening the circuit court of appeal, and devolving upon them a larger measure of final jurisdiction.

I am, of course, in thorough accord with the effort of the American Bar Association to bring about the passage of the law empowering the Supreme Court to make rules of practice and procedure for law cases, and hope that the effort may succeed during the life of the present Congress.

Very sincerely,

GEO. SUTHERLAND.

BOOK REVIEWS.

COLLIER ON BANKRUPTCY—TWELFTH EDITION.

The most popular work on Bankruptcy is undoubtedly that written by Mr. William Miller Collier, the twelfth edition of which is just from the press, edited by Mr. Frank B. Gilbert of Albany, N. Y., and Mr. Fred E. Rosbrook of Rochester, N. Y.

This is a pioneer work on this subject and has attained a very high position with the bench and bar, a position which it has maintained for at least twenty-three years. Lawyers and judges will favor the method of treatment of the Bankruptcy Act adopted by the author of this work, namely, that of following the order of the act itself in the classification of the subjects treated. It must be remembered that the law of bankruptcy is wholly statutory. It requires for its elucidation a discussion of decisions and application of decisions construing the statute. It is therefore clear that these final pronouncements should not be discussed except as they are combined and related to the statute itself. The plan of Mr. Collier, therefore, to keep the provisions of the statute prominent and set forth in large type has facilitated the work of investigation by attorneys and has made it preeminently the practitioners' work.

The large increase in the number of decisions has made the new work necessary, although it has been only three years since the first

edition was published. A new feature of this edition is the addition of the new Canadian Bankruptcy Act and the general rules thereunder, which became operative July 1, 1920.

This new edition, although it includes a large amount of new matter, yet is confined in two volumes. This is made possible by the adoption of a very large Royal Octavo page—probably the largest type page in any law text book—measuring 41 square inches. The type is set solid, and the page averages about one-third more than the ordinary law text book.

Printed in two volumes of 1729 pages. Bound in law buckram.

BALLANTINE'S PREPARATION OF CONTRACTS AND CONVEYANCES.

This is a small volume by Henry Winthrop Ballantine, Professor of Law in the University of Minnesota. It is written primarily for students, to supplement a course in conveyancing and drafting of instruments for law schools. Such a course is an innovation in law schools, but has proved to be interesting and valuable to students.

The book covers a wide range of subjects. It begins with suggestions respecting the preparation of negotiable instruments; it discusses the powers of attorneys, and takes up the subject of conveyancing, including contracts for the sale of real estate; the preparation of deeds, real estate mortgages, deeds of trust, leases and abstracts of title. There are many valuable suggestions regarding chattel mortgages and conditional sales, together with a chapter on building and construction contracts.

The author closes the book with three interesting chapters on business organization including the subjects of partnership, corporations, and business trusts as substitutes for corporations.

We believe that the older lawyers, as well as the younger members of the bar and students, will find this book interesting and helpful. There are many suggestions given respecting the law of various contracts which inform the conveyancer of the dangers of which he ought to be warned. A study of this volume by lawyers and students, we have no doubt, will increase their knowledge of the practical application of the subjects of contracts and conveyancing, and will tend to make its readers skillful draftsmen in conveyancing.

Printed in one volume of 227 pages; bound in blue cloth.

HUMOR OF THE LAW.

A lawyer in Seattle, who had a client who was dissatisfied with a suit of clothes made by a Chinese tailor, notified the "Heathen Chinee" that he wanted a new suit made. Here is the answer which the Oriental made to the lawyer's demand:

"Concern Mr. J. suit of clothes which he make in our store last October. There a notice hing near the looking glass in my store reads as fellow. If your suits misfit or anything wrong must bring back within a week for alteration, otherwise not responsible. Now he wear his suit 4 months. If the suit is too small why he not bring back for alteration within the week as the notice say. If a man when put the coat on are roughly not only a suit for $42.00 will burst, even a new suit for one hundred dollar will burst too. If the stitch come off is my fault. But burst is not my fault because he put on the suit are roughly. Last time I fix his suit is do my best, and free of charge too. I think that is fairness. Please explain to Mr. J. about that. I think he will satisfactorily."

Lawyer—You stated that if the defendant did not pay this money, you would be broke, and there would be nothing left for you to do except to commit suicide, did you not?

Witness—No, sir.

Lawyer—Did you not threaten to jump into the river.

Witness—Oh, yes; I told him I would jump into the river. You see it is like this. The thermometer was running about 100 degrees every day during the middle of August and I was in the habit of going swimming every evening about six o'clock. I do not like to dive, but prefer to jump, so I would always go out to the end of the spring board, and jump off instead of diving off. That was what I had in mind, although I was perfectly willing to leave the impression with him that I intended to commit suicide if he did not pay the money.

In Ireland some years ago an Irish-American was brought up before Justice Barry on the charge of suspicious conduct. The officer who arrested him stated, among other things, that he was wearing a "Republican hat."

"Does your Honor know what that is?" asked the counsel.

"It may be,' responded the judge, "that it's a hat without a crown."—*Boston Transcript.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Animals**—Dipping Cattle.—Where a county was operating under the laws for tick eradication and fixed particular days for owners of cattle to dip them in vats constructed by the county, at which an inspector in the employment of the county was present to supervise the dipping, and a cattle owner failed to carry his cattle on said day, but at the direction of the inspector carried them to the vat on the following Monday and dipped them himself, the inspector not being present, he cannot recover for damage or injury to cattle resulting from the dipping under his own supervision, under chapter 38, Laws Extra Session of Mississippi of 1917.—Pippin v. Clarke County, Miss., 87 So. 283.

2. **Bankruptcy**—Appearance. — Under Bankruptcy, § 18 b (Comp. St. § 9602), fixing the time for the bankrupt to appear and plead to the petition, and section 18e, requiring the judge to make adjudication or dismiss the petition if no pleadings are filed the last day allowed, there can be no "appearance," which is defined as coming into court as a party to a suit, without "pleading," which is a written allegation of what is affirmed on one side and denied on the other. —In re Puget Sound Engineering Co., U. S. D. C. 270 Fed. 353.

3.——Equitable Lien.—Where a trustee in bankruptcy, knowing the facts creating an equitable lien on property, sold the property and used the proceeds in paying costs of administration primarily chargeable against the general assets, a court of equity, following the maxim that equity will look upon that as done which ought to have been done, will follow the proceeds into the entire mass of the estate, giving the party injured by the unlawful diversion a priority of right over the other creditors. —In re Plantations Co., U. S. D. C. 270 Fed. 273.

4.——Homestead Exemption.—Bankrupts held not entitled to a homestead exemption which had not been claimed on the record of title, as required by the laws of the state, because the failure to enter such claim was due to the negligence of the attorney employed by them in the bankruptcy proceedings.—Edgington v. Taylor, U. S. C. C. A. 270 Fed. 48.

5. **Brokers**—Broker as Principal and Agent.—Though a broker acts as principal under rules of the Cotton Exchange, that fact does not preclude a contract whereby the broker with respect to his customer acts merely as agent.—Scandinavian Import-Export Co. v. Bachman, N. Y. 186 N. Y. S. 860.

6.——Listing Property for Sale.—When an owner of land enters into a written contract, whereby he lists his land with a broker "for sale," though the description of the land and the terms of sale are set out therein, the broker's authority to enter into a contract of sale for his principal will not be inferred from the words "for sale," used in the contract, and, in order that such authority exists, it must affirmatively and unequivocally appear from the writing, or, at least, must be so indicated from other terms used, that the contract, in the light of surrounding circumstances or the construction placed upon it by the parties, or other proper evidence to explain ambiguity, will clearly show that such authority was intended.—Gould v. Rockwell, Neb. 181 N. W. 655.

7. **Constitutional Law.**—Dance Ordinance Unconstitutional.—An ordinance prohibiting after 10 p. m. dancing or dance music in a room or hall within 25 feet of a residence held violative of the Fourteenth Amendment and Const. art. 1, § 1, being unreasonable and oppressive, and unduly and unwarrantably interfering with personal rights.—Ex Parte Hall, Cal. 195 Pac. 975.

8.——Delegation of Legislative Power.—Federal Control Act March 21, 1918, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾i), construed as authorizing the President through the Director General of Railroads, to require suits against the Director General to be brought in the district of plaintiff's residence or the district in which the cause of action arose, was not an unconstitutional delegation of legislative power.—Ellis v. Atlanta, B. & A.. Ry. Co., U. S. D. C. 270 Fed. 279.

9.——Due Process of Law.—Rev. St. 1911, art. 5475, as amended in 1915 (Acts 34th Leg. c. 38 [Vernon's Ann. Civ. St. Supp. 1918, art. 5475]), providing that a letting of farm lands giving to the landlord more than one-third of crops shall be void, violates the due process clauses of the state and federal Constitutions (Const. Tex. art. 1, § 19; Const. U. S. Amend. 14, § 1).—Rumbo v. Winterrowd, Tex. 228 S. W. 258.

10. **Contracts**—Fiduciary Relation. — Where plaintiff, shareholder in a partnership, with title to its property vested in managing trustees, arranged with defendant to vote his shares in favor of sale and transfer of the firm property to defendant, and to participate equally with defendant in profits derived from such purchase and sale of the property of the firm and also of the shares, such deliberate violation by plaintiff of the fiduciary relation in which he stood to his fellow shareholders, to their loss and his individual gain, will not be sanctioned in suit

by plaintiff, praying that a partnership be decreed to exist between him and defendant in accordance with their corrupt agreement.—Howe v. Chmielinski, Mass. 130 N. E. 56.

11. **Corporations**—Overvaluation of Property.—Directors of a corporation may be honestly mistaken as to the value of property taken in exchange for corporate stock, and, in the absence of proof that their overvaluation was not the result of innocent mistake, the stockholders cannot be held liable to corporate creditors for any difference between the true worth of the property and the par value of the stock; it not being sufficient to prove merely that the property was overvalued in the exchange, and the fraudulent intent must be clearly shown.—Andrews v. Panama Oil Co., Cal. 195 Pac. 963.

12. **Customs Duties**—Collector Cannot be Sued in Official Capacity.—A collector of customs cannot be sued in his official capacity; the remedy ing by suit against him individually to recover money wrongfully exacted under color of his office, or by suit against the United States, under Judicial Code, § 24, subd. 20 (Comp. St. § 991 [20]).—Rankin Gilmour & Co., v. Newton, U. S. D. C. 270 Fed. 332.

13. **Deeds.**—Remainders. — Where defendant conveyed lands to his stepmother for life with remainder to the heirs of his father then living, the conveyance of the remainder should not be set aside on the ground that there are no heirs of a person living, but the word "heirs" should be construed as "children" giving a vested remainder to the children living subject to being opened in case of afterborn children.—Miller v. Harland, Ind. 129 N. E. 134.

14. **Depositaries.**—Liability on New Bond.—Where bond of bank as depository was surrendered by the state insurance commissioner in consideration of the bank's agreement to procure new bond, the bank, on receiving the new bond from the surety for its signature, was under the legal obligation to sign the bond and deliver it to the insurance commissioner, and was liable on bond even if it refused to so do, having received full consideration by the surrender of the old bond.—Donaldson v. Hartford Accident & Indemnity Co., Pa. 112 Atl. 563.

15. **Descent and Distribution** — Receipt for "Partial Share.—A written receipt, given by a daughter to her father, acknowledging payment of a sum of money which she accepts as her partial share of all real estate left by him at his death, does not bar her right to any participation in such real estate, which would have been its effect if the word "partial" had been omitted, since her share in his estate would be the portion she was entitled to, but the word "partial," when given its ordinary meaning as affecting a part only, not total, indicates that the money received was only an advancement made to the daughter.—Swigert v. Miles, Ind. 130 N. E. 130.

16. **Electricity**—Ordinary Care. — That electricity is a dangerous element does not require that a master use more than ordinary care for the protection of his servants from dangers arising therefrom; but the quantum of such care, made necessary by reason of the presence of such dangerous element, is a fact to be considered in determining whether a master has discharged his duty toward his servant in a particular instance.—Hines v. Nichols, Ind. 129 N. E. 140.

17. **Executors and Administrators**—Claim of Partnership.—All members of a copartnership or association of persons filing a claim against an estate of a deceased person need not make the affidavit required by Code Civ. Proc. § 1494, since under Civ. Code, § 2429, a partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, including the power to collect for the partnership interest a partnership debt, and one or more partners may make the affidavit in behalf of all of them.—Sime v. Hunter, Cal. 195 Pac. 935.

18. **False Imprisonment**—"Escape."—A deputy sheriff who arrested plaintiff, placed her in the county jail, and made no effort to bring her before the proper tribunal as required by the warrant, or before a magistrate as required by Rev. St. c. 135, § 9, and did not deliver the warrant with a proper return to the magistrate, was not relieved of liability for assault and false imprisonment by the fact that sheriff released the prisoner, where for two weeks he made no effort to rearrest her, though there would have been no difficulty in finding or arresting her.—Helfer v. Hunt, Me. 112 Atl. 675.

19. **Gaming**—Averments.—An indictment for keeping a gaming house need not allege the name of any person who played there.—James v. State, Ind. 130 N. E. 115.

20. **Highways**—Prescriptive Use.—As a genrule, highways may be established by prescriptive use over or along the right of way of a railway company.—City of Raton v. Pollard, U. S. C. C. A. 270 Fed. 5.

21. **Homestead**—Cancellation of Mortgage.—Where a wife joins in a mortgage upon a homestead with the understanding that it is to be used for a specific purpose, and where the purpose fails and the rights of innocent third parties have not attached or been prejudiced, the wife has an equitable right to have the mortgage canceled as a lien upon the homestead.—Kittel v. Straus, N. D. 181 N. W. 628.

22. **Husband and Wife**—Authority of Husband to Contract.—Where a husband had no express authority from his wife, his assent to an arrangement whereby a broker obtained as purchaser a proposed corporation to take over property belonging to wife was not binding on wife, who did not assent thereto.—Rusher v. Watt, N. Y. 186 N. Y. S. 858.

23. **Innkeepers**—Bailee for Hire. — Where plaintiff, who had been a guest in defendant's hotel, left a trunk temporarily in the hotel's keeping, the manager assuring her that the trunk would be taken care of, and it appeared that on plaintiff's return a diamond pendant worth more than $1,000 was missing from the trunk, in an action to recover the value, held, that a motion to dismiss the complaint was properly allowed, where there was no evidence that defendant had actual notice that the pendant was in the trunk.—Waters v. Beau Site Co., N. Y.. 186 N. Y. S. 731.

24. **Insurance**—Knowledge of Illness.—An insurance company is bound by a life policy delivered by an authorized agent to insured, when the agent had knowledge the insured was then sick, notwithstanding a provision requiring good health of insured when the policy was delivered to make it effectual.—Kansas City Life Ins. Co. v. Ridout, Ark. 228 S. W. 55.

25.——Military Service.—The provision of a life insurance policy reducing the amount of recovery in case of insured's death outside the United States while in military service as an enlisted man, unless insurer was notified of such enlistment and an additional premium paid, means, by the word "enlisted," one enrolling in the service, whether he volunteered or was drafted, and where such a one failed to comply and died in service his beneficiary cannot recover the full amount of the policy.—McQueen v. Sovereign Camp, W. O. W., S. C. 106 S. E. 32.

26. **Intoxicating Liquors**—Locked Safe.—Prohibition agents, holding a warrant to search for intoxicating liquors, were entitled to take a locked safe into their possession for a reasonable time until it could be opened, where defendant locked the safe and refused to open it.—United States v. Metzger, U. S. D. C. 270 Fed. 291.

27.——Offense Complete on Purchase for Transportation.—Under Act March 3, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 8739a), making it an offense to order or purchase intoxicating liquors for the purpose of being transported in interstate commerce, as well as for transporting such liquors into state commerce, the offense of purchasing is complete on purchase for the purpose of transportation, and an indictment therefor need not allege the liquors were actually transported.—Tacon v. United States, U. S. C. C. A. 270 Fed. 82.

28.——Police Power.—Const. U. S. Amend. 18, and the National Prohibition Act confer no rights to sell Jamaica ginger in quantities not prohibited by the act, but were intended as limitation upon privilege, and therefore a state,

under its police power, can prohibit the sale of such quantities.—Woods v. City of Seattle, U. S. D. C. 270 Fed. 315.

29.——State Law.—Under Const. U. S. Amend. 18, the Act 36th Leg. (1919, 2d Called Sess.) c. 78, prohibiting the transportation of intoxicating liquor containing more than 1 per cent of alcohol, is valid though a federal law prohibits the transportation, etc., of liquor containing more than one-half of 1 per cent of alcohol.—Ex Parte Gilmore, Tex. 228 S. W. 199.

30.——Unlawful Search.—An order requiring the return of intoxicating liquor taken from the home of one of the defendants in a criminal case during an unlawful search of his home was not appealable, where the court did not assume jurisdiction for the purpose of trying the title or right of possession, but merely to prevent the use of evidence of property wrongfully seized.—United States v. Marquette, U. S. C. C. A. 270 Fed. 214.

31.—"Violation of Law."—Such act, so declared by the Constitution to be unlawful, or prohibited, is included within the language "in violation of law," as found in section 13195, General Code.—Hoffrichter v. State, Ohio 130 N. E. 157.

32. **Landlord and Tenant**—Forcible Entry.—An action of forcible entry and detainer is purely a possessory action, and the question of title, or right to title, cannot be determined in such actions. If title is involved, it is only as an incident, and can only be inquired into for the purpose of determining who has the right to possession.—Montgomery v. Hill, Okla. 195 Pac. 897.

33.——Lease for Saloon Purposes.—Lease requiring premises to be used for saloon purposes for specified period was terminated by enactment of the state-wide prohibition law, since such law made performance by lessee impossible.—Schaub v. Wright, Ind. 130 N. E. 143.

34.——Lease Upon Condition.—The common-law rule that an estate upon condition does not ipso facto terminate upon its breach, but can be determined only by entry by one authorized to take advantage of the condition, applies to a lease with a condition subsequent, giving the landlord a right to enter and terminate the estate on breach of covenant against assignment without previous written permission; and is not abrogated by Rev. St. c. 109, § 4, which applies to cases in which the common law required a formal entry to restore the seizing to one who had been dis-seized or otherwise deprived of it.—Clifford v. Androscoggin & K. R. Co., Me. 112 Atl. 669.

35. **Licenses**—Blue Sky Law.—A corporation organized under the Laws of Delaware which undertook to establish a wholesale drug business in the state held one which the Blue Sky Law was designed to regulate.—Goodyear v. Meux, Tenn. 228 S. W. 57.

36. **Life Estates**—Waste by Life Tenant.—Where a life tenant, holding five separate properties, on four of which were mortgages, assigned three of the mortgages to third persons, who foreclosed two of them and commenced an action for foreclosure of a third, and it appeared that at the time of the assignment there was interest due and unpaid, and there were taxes on the properties covered, and that interest and accruing interest, together with the taxes, were paid out of the proceeds on foreclosure, held, that waste on the life tenant's part was shown, impairing the remainders and partially destroying them.—Sweeney v. Schoneberger, N. Y. 186 N. Y. S. 707.

37. **Master and Servant**—Arbitrary Award.—The commissioners, in exercising the powers given to them under Workmen's Compensation Law, §§ 20, 65, 68, cannot make an award under section 15 for an injury in excess of the proportionate loss of hand fixed by the testimony of the physicians, on a personal examination by one of the commissioners, since to permit such an award would be arbitrary, and violate the due process of law provisions of the Constitution.—Schermerhorn v. General Electric Co., N. Y. 186 N. Y. S. 835.

38.—Defective Insulation.—Where a trolley line repair man working on an insulated platform was killed by an electric shock from a defectively insulated feed wire, the master's liability for the defective insulation is not defeated by the fact that the accident could not have occurred unless the man was in contact with some grounded wire, and the master was not in control of such wire, since the defective insulation and the grounded wire were concurring causes.—Sudmeyer v. United Rys. Co. of St. Louis, Mo. 228 S. W. 64.

39.——Recovery on Federal Act.—Where, in a suit against a common carrier for personal injuries to an employe, the petition contains two counts, one based on the state law and the other on the federal Employers' Liability Act, and a verdict in favor of the plaintiff is based expressly on the latter count, the evidence must show that at the time of the injury the carrier was engaged in interstate commerce, and that the injured employe was also then employed in interstate commerce. In the instant case the evidence negatives these two essential facts.—Payne v. Demott, Ga. 106 S. E. 9.

40.——Reservation to Supervise Work of Contractor.—Reservation by a sugar company having coal conveyors to boilers installed under contract of a right to supervise the work by furnishing a superintendent did not make the sugar company the employer of men who did the work, and it was not liable for injuries to such a servant of the contractor under the Employers' Liability Act of 1911 (Laws 1911, c. 88), which applies only to cases where the relation of employer and employe exists.—Naylor v. Hollant-St. Louis Sugar Co., Ind. 130 N. E. 152.

41.——Res Ipsa Ioquitur.—The doctrine of res ipsa loquitur does not apply to the case of injuries to a drug clerk temporarily in defendant's employ caused by the explosion of a soda tank lent to defendant for use while he was using the gas therein.—Russell v. Spaulding, Mass. 130 N. E. 195.

42.——Sleeping Sickness.—An employe, whose head was bumped, was not entitled to compensation for sleeping sickness of which he became a victim subsequent to accident, in absence of evidence that the disease was caused by the accident; such disease not being an "injury," within Const. art. 1, § 19, and Workmen's Compensation Law, § 3, subd. 7, defining compensable injuries as accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.—Donovan v. Alliance Electric Co., N. Y. 186 N. Y. S. 813.

43.——Ulcer is a "Disease" or "Infection."—An ulcer is a "disease" or "infection," within Workmen's Compensation Law, § 3, subd. 7, declaring that "injury," or "personal injury," as used in the act, means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.—Pinto v. Chelsea Fibre Mills, N. Y. 186 N. Y. S. 749.

44. **Mines and Minerals**—"Producing Well."—A "producing well" in an oil lease providing that no rental should be paid lessor after producing well had been brought in is one the product of which yields a royalty to the landowner, and not one in which the oil is allowed to stand without being taken and prepared for market.—Kies v. Williams, Ky. 228 S. W. 41.

45. **Monopolies**—Restraint of Trade.—A contract, whereby plaintiff oil company lent defendant garage partnership a gasoline pump to be used in the sale of the oil company's gasoline, in consideration of which the partnership agreed to purchase for cash all the oil company's gasoline, accepting conditions requiring them not to use the equipment for any other purpose than that specified, with provision that immediately upon infringement of the contract the oil company might remove the equipment or bill it to the partnership at its initial value, held, not void as against public policy, not constituting a restraint on trade greater than necessary for the oil company's protection.—Quincy Oil Co. v. Sylvester, Mass. 130 N. E. 217.

46. **Mortgages**—Foreclosure.—Laws 1917, c. 192, amending Rev. St. 1916, c. 95 § 4, requiring in case of foreclosure of mortgage by possession, the recording of affidavit in the registry of deeds within three months after the expiration of one year from the taking of possession,

held applicable to foreclosures begun after its passage, including foreclosures of prior existing mortgages.—Barton v. Conley, Me. 112 Atl. 670.

47. **Municipal Corporations**—Building Sidewalks.—Owner may enjoin building new sidewalk, where permanent walk already built.—Sleeth v. City of Elkins, W. Va. 106 S. E. 73.

48.——Ice on Sidewalk.—The act of the lessee of premises in which a fire occurred, causing an accumulation of ice and broken glass on the sidewalk in sweeping up the glass and ice after a pedestrian fell thereon and was injured, did not prove or tend to prove any wrongful act or omission by the lessee or amount to an admission of liability to the pedestrian.—Tiffany v. F. Vorenberg Co., Mass. 130 N. E. 193.

49. **Navigable Waters**—Depends on Consent of Riparian Owner.—The title to the bed of a navigable stream being in the state, the water flowing over that bed is held by the state for the use of the people as a whole, equally, with the exception that none can land on the land of riparian owner without his consent.—Thompson v. Ft. Miller Pulp & Paper Co., N. Y. 186 N. Y. S. 817.

50. **Negligence**—Artificial Pool.—The degree of care required of one maintaining on his land an artificial pool of water for a useful purpose is no greater than that required of one through whose land flows a natural stream, and he is bound to no special care or precaution for the protection of children in the habit of swimming therein, unless there is in the pool some peculiar danger in the nature of a hidden peril or trap for the unwary, of which he has or ought to have knowledge.—Troglia v. Butte Superior Mining Co., U. S. C. C. A. 270 Fed. 75.

51. **Parent and Child**—Father's Duty to Support Child.—A mother has no power to make a binding agreement releasing the father from the support and maintenance of the child after the death of the mother; such responsibility being cast upon the father until the child's majority.—Michaels v. Flach, N. Y., 186 N. Y. S. 899.

52. **Principal and Agent**—Payment of Note to Third Party.—Where the holder of a past-due note is insisting upon the payment in full and procures a third party to bring pressure upon the debtor to persuade him to pay, the circumstances attributable to the holder's acts being such as to give the debtor reasonable ground to infer that such party, although not in possession of the note, is authorized to receive payment as agent for the holder, the debtor, in the absence of notice to the contrary, is entitled to assume that such authority exists, and payment to such third party will be binding upon the holder.—Krause v. Cox, Neb. 181 N. W. 611.

53. **Sales**—Completion.—Where a seller in accepting a buyer's offer asked the buyer to send a check for $1,000 to bind the trade, and the buyer in reply promised to mail a check in a few days, but never did, if the acceptance was qualified the buyer might have treated it as a rejection, but, having assented to the qualification, the sale was complete notwithstanding the failure to send the check.—University of Maine v. Pratt, Me. 112 Atl. 673.

54.——Implied Warranty.—Under Sales Act, § 15, cl. 4, there is no implied warranty as to the fitness for any particular purpose on a sale of a specified article under its patent or other trade name.—Boston Consol. Gas Co. v. Folsom, Mass. 130 N. E. 197.

55.——Measure of Damages.—Buyer on seller's failure to deliver could not recover for loss of profits under his contract to sell to third parties at a higher price unless seller in making contracts with buyer had special notice that buyer had contracted to sell to third parties, in which case the measure of damages would be the difference between the price expressed in the original contract and the price buyer was to receive.—Barnes v. Early-Foster Co., Tex. 228 S. W. 248.

56. **Specific Performance.**—Incomplete Contract.—A writing, signed by the owners of a gas well to dispose of their product at stipulated prices during the remainder of the contract to be prepared and executed, is incomplete because the term is not given, and on its face it indicates the execution of an agreement setting forth the necessary terms, so that such contract cannot be specifically enforced under the statute of frauds after the execution of the proposed agreement was refused.—Manufacturers' Light & Heat Co. v. Lamp, Pa. 112 Atl. 679.

57.——Return of Money.—Where defendants agreed only to convey lot if they could, and expressly stipulated that, if they could not convey what they had agreed to sell, they should be called on for nothing except the return of the hand money, a bill in equity by plaintiff praying specific performance of the contract was properly dismissed on demurrer, where petition showed defendants could not convey title as agreed.—Safron v. David McBurney & Son, Pa. 112 Atl. 677.

58. **Statutes**—Punctuation Marks.—Punctuation marks in the statute may be disregarded, when they lead to results inconsistent with the apparent intention of the General Assembly, as expressed in the statute itself.—Kubis v. Town of Cornwall, Conn. 112 Atl. 663.

59. **Vendor and Purchaser**—Option.—A privilege or option of buying after the death of the vendor, or whenever she was ready to sell the property, entitled the purchaser to a reasonable time in which to exercise his right, and he was not bound to determine whether he would take the property or not until such time after the vendor's death as the will had been probated and the executor duly qualified, for until such time no one could have performed the contract.—In re Miller's Will, N. Y. 186 N. Y. S. 661.

60. **Wills**—Codicil.—The language of item 3 of the codicil of will here in question did not create a condition precedent to the vesting of the estate, and did not prevent the devise from becoming effective, but it created a charge against the land for the difference between the value of all the property bequeathed and devised to the testator's daughter and her children, and the amount of their distributive share in testator's estate.—Maynard v. Zellner, Ga. 105 S. E. 837.

61.——Accumulations.—A provision in a will, providing for a hundred years, with the expenditure of money for tombstones, held not to provide for the maintenance or care of a cemetery or other place for the burial of dead within the meaning of Act May 26, 1891 (P. L. 119) § 1, providing that disposition of property for maintenance of cemetery, churchyard or other place for the burial of the dead shall not fail by reason of having been made in perpetuity.—Wise v. Rupp, Pa. 112 Atl. 548.

62.——Capacity to Make.—Occasional and isolated facts concerning the actions and conduct of the testator which prove no more than to show him an eccentric individual, or curious and queer in his disposition and conduct, and acts which are somewhat out of line with the course of conduct usually pursued by the generality of mankind, will not of themselves be sufficient to establish mental incapacity.—Wood establish mental incapacity.—Wood v. Corcoran, Ky. 228 S. W. 32.

63.——Capacity to Make.—Less mental capacity is required to enable a man to make a valid will than to enter into valid contracts.—In re Bossom's Will, N. Y. 186 N. Y. S. 782.

64.——Mutual Wills.—If husband and wife made a compact to dispose of their combined estates, the terms of which found expression in their mutual wills, the contract will be enforced in equity according to established practice, equity not interfering with probate of the wife's later will, made in violation of the contract, but enforcing the contract against her estate, she being the survivor, by impressing a trust on the assets.—Tooker v. Vreeland, N. J. 112 Atl. 665.

65. **Witnesses**—Mayor as Witness.—A party cannot call a judge as a witness, or the judge himself cannot testify in a cause, where the court is held by a single judge, and thus destroy the court. This principle is applicable to the mayor and director of public safety of a city, sitting to hear charges preferred against the acting chief of police.—Crawford v. Hendee, N. J. 112 Atl. 668.